RECORD AND BRIEFS

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No. 16-327

In the Supreme Court of the United States

JAE LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Petitioner, a noncitizen defendant against whom the evidence of guilt was overwhelming, pleaded guilty after receiving deficient advice about the immigration consequences of conviction. The question presented is whether he may establish the prejudice necessary to show ineffective assistance of counsel when it was objectively unreasonable to believe that he could have avoided removal by going to trial or through plea negotiations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 825 F.3d 311. The order of the district court (Pet. App. 11a-50a) is unreported but is available at 2014 WL 1260388. The report and recommendation of the magistrate judge (Pet. App. 51a-77a) is unreported but is available at 2013 WL 8116841.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2016. The petition for a writ of certiorari was filed on September 6, 2016, and was granted on December 14, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner was convicted of possessing ecstasy with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 12a, 15a. He was sentenced to 12 months and one day of imprisonment, to be followed by three years of supervised release. *Id.* at 16a-17a. Petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence, based on a claim of ineffective assistance of counsel arising out of his attorney's deficient advice about the immigration consequences of his plea. The district court denied relief, Pet. App. 11a-50a, and the court of appeals affirmed, holding that petitioner could not establish prejudice as required by *Strickland* v. *Washington*, 466 U.S. 668 (1984), because he could not show that rejection of his plea bargain would have been objectively rational under the circumstances, Pet. App. 1a-10a.

A. Petitioner's Offense And Conviction

1. Petitioner was a restauranteur and drug dealer in Memphis, Tennessee. Pet. App. 2a, 12a-14a. A confidential informant told federal agents that, over the course of eight years, petitioner sold the informant roughly 200 ecstasy pills, as well as two ounces of hydroponic marijuana. *Id.* at 12a-13a. The informant also told the agents that, due to an earlier purchase of drugs on credit, the informant owed petitioner a $150

"drug debt." *Id.* at 13a. The agents provided the informant with $150 and instructions to meet with petitioner to settle the debt. *Ibid.* The informant took the money to petitioner's townhouse and spent about ten minutes inside. *Ibid.*; see Presentence Investigation Report (PSR) ¶ 36. After emerging, the informant reported having seen petitioner "packaging 15 Ecstasy tablets into a cellophane wrapper." Pet. App. 13a.

Shortly thereafter, the agents arranged for the informant to make a controlled purchase of ecstasy from petitioner. Pet. App. 13a. Under the surveillance of the agents, and while wearing a recording device, the informant went to petitioner's townhouse with $300. *Ibid.* Petitioner met the informant there and said that he now charged $20 a pill instead of $15. *Ibid.* The informant agreed to the new price and bought 15 ecstasy pills, which were later turned over to the agents. *Ibid.*

The agents obtained a warrant to search petitioner's townhouse. Pet. App. 14a. Their search uncovered 88 ecstasy pills, $32,432 in cash, three Valium tablets, and a loaded 7.62-caliber rifle. *Ibid.* According to the agents, after being advised of his *Miranda* rights, petitioner acknowledged ownership of "[a]ll of the narcotics" found in the townhouse. J.A. 75. He also told the agents that he "gave [the ecstasy] away" to other people, although he (at that time) denied selling it. *Ibid.*

2. A federal grand jury in the Western District of Tennessee indicted petitioner on one count of possessing ecstasy (a Schedule I drug) with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 12a; J.A. 5. The elements of that offense are "knowing[] or intentional[] * * * possess[ion]" of a

"controlled substance," and an "intent to * * * distribute" it. 21 U.S.C. 841(a)(1). "Proof of intent to sell is not required." *United States* v. *Jackson*, 55 F.3d 1219, 1226 (6th Cir.) (emphasis omitted), cert. denied, 516 U.S. 926 (1995); see *United States* v. *Wallace*, 532 F.3d 126, 129 (2d Cir.) (citing circuit decisions recognizing "that distribution within the meaning of [Section] 841(a) can take place without a sale"), cert. denied, 555 U.S. 1009 (2008).

a. The parties discussed a plea agreement under which petitioner could receive credit under the Sentencing Guidelines for acceptance of responsibility and might qualify for a reduced sentence under the statutory "safety valve" provision, 18 U.S.C. 3553(f). Pet. App. 55a. During those discussions, petitioner and his counsel participated in a proffer session, at which petitioner admitted to "selling drugs for money." J.A. 223; see 18 U.S.C. 3553(f)(5) (requiring defendant to "truthfully provide[] to the Government all information and evidence the defendant has concerning the offense" to qualify for the safety valve). Although an agreement precluded the government from introducing that admission in its case-in-chief at a trial, the government could use it to impeach petitioner if he were to make an inconsistent statement in a judicial proceeding. J.A. 223, 231-232, 238.

b. Petitioner is a native of South Korea who arrived in the United States as a minor in 1982. Pet. App. 2a. Unlike his parents, petitioner did not become a United States citizen, but instead remained an alien, with lawful-permanent-resident status. *Id.* at 2a, 52a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, conviction of an "aggravated felony" requires removal from the United States and

has other immigration consequences. See 8 U.S.C. 1227(a)(2)(A)(iii) (removability); see also, *e.g.*, 8 U.S.C. 1101(f)(8) and 1229c(b)(1)(B) (voluntary departure ineligibility), 1158(b)(2)(A)(ii) and (B)(i) (asylum ineligibility), 1229b(a)(3) (cancellation ineligibility), 1326(a) and (b)(2) (increased statutory maximum penalty for illegal reentry). Since its inception, the definition of "aggravated felony" has included "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." 18 U.S.C. 924(c)(2); see 8 U.S.C. 1101(a)(43)(B); see also 18 U.S.C. 924(c)(2) (1988); Anti-Drug Abuse Act of 1988, Tit. VII, Subtit. J, Pub. L. No. 100-690, § 7342, 102 Stat. 4469.

Because a violation of Section 841(a)(1) is a felony under the Controlled Substances Act with a maximum penalty of 20 years of imprisonment, it qualifies as an "aggravated felony" under the INA, and conviction of that offense subjects an alien to removal. See 21 U.S.C. 841(b)(1)(C); Pet. App. 2a-3a. Petitioner's retained attorney, however, "assured him that he would not be subject to * * * removal" if he pleaded guilty, apparently based on a mistaken belief that the prosecution had discretion not to seek removal. Pet. App. 2a (internal quotation marks omitted); see *id.* at 53a, 60a; see also J.A. 215-216.

c. Petitioner ultimately entered into a written plea agreement with the government, under which the government would recommend a three-level acceptance-of-responsibility adjustment in the calculation of his Sentencing Guidelines range and would not object to application of the safety-valve provision. J.A. 6-8. At petitioner's change-of-plea hearing, the district court advised him that "conviction on this charge * * * could result in your being deported." J.A. 103. Peti-

tioner's attorney, however, privately reassured him that he would not be removed, and he proceeded to enter a guilty plea. Pet. App. 61a; J.A. 98-114. The district court found a factual basis for the plea in the government's representations that the evidence at trial would have included, *inter alia*, testimony from law-enforcement agents that the amount of ecstasy recovered from the townhouse was "consistent with distribution rather than personal use." J.A. 109; see J.A. 110.

3. In anticipation of sentencing, the Probation Office calculated a Sentencing Guidelines range of 24 to 30 months of imprisonment, based on an offense level of 17 and a criminal history category of I. J.A. 119. In accordance with the plea agreement, that calculation included a three-level downward adjustment to the offense level for acceptance of responsibility. *Ibid.* It also included a two-level enhancement to the offense level for petitioner's possession of a dangerous weapon (the loaded rifle) at the time of the offense, *ibid.*, a fact that additionally disqualified him from the statutory safety valve, J.A. 121; see 18 U.S.C. 3553(f)(2). Without the three-level downward adjustment for acceptance of responsibility, petitioner's offense level would have been 20, and his Guidelines range would have been 33 to 41 months of imprisonment. See Sentencing Guidelines Ch. 5, Pt. A (2008) (table).

At sentencing, petitioner's counsel argued that petitioner's offense was just "one glitch" in an otherwise "exemplary" life since immigrating to the United States and requested a sentence of probation or, at most, "six months [in a] halfway house." J.A. 120-122. The district court, however, rejected that characterization of petitioner's crime and determined that stricter punishment was appropriate. See J.A. 122, 124-125. The

court emphasized the undisputed evidence that that petitioner's drug dealing was a "very * * * serious offense" that "ha[d] been ongoing for some period of time." J.A. 124. Although "he was not caught until now," petitioner "ha[d] been engaged in drug trafficking for ten years." J.A. 122. "It was not simply one aberrant act," the court explained, "but apparently one time getting caught." J.A. 124. The court also considered it "fool hardy to believe that" petitioner's "ten year term" of drug dealing "included only the three hundred" pills bought by the confidential informant or found in petitioner's townhouse. J.A. 125. Thus, although certain mitigating factors existed (such as petitioner's work history and nonviolent past), the court imposed a term of imprisonment of 12 months and a day. *Ibid.* Petitioner did not appeal. Pet. App. 18a.

B. Petitioner's Collateral Challenge To His Conviction

1. Petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence on the ground that his attorney had provided ineffective assistance of counsel by, *inter alia*, misadvising him about the immigration consequences of his plea. Pet. App. 18a-19a. A magistrate judge held an evidentiary hearing on petitioner's motion. J.A. 152-251. At the hearing, petitioner testified that his attorney had assured him that he would not be removed based on his plea, J.A. 173, and that, had he known his plea would result in removal, he would have proceeded "to a trial all the way with my strong evidence and my witnesses," J.A. 180. Those witnesses, petitioner explained, would have testified that he was a "hard working man" who "may party using ecstasy and give it away to friends." *Ibid.*

Petitioner's former attorney testified that he was not aware that conviction under Section 841(a)(1) would

result in mandatory deportation. Pet. App. 54a. He further testified that with knowledge of that immigration consequence, he would have advised petitioner to go to trial and believed that petitioner would have done so. *Id.* at 56a; see J.A. 236-237. But he acknowledged that this "was 'a bad case to try' because, among other reasons, there was no basis for attacking the search of [petitioner's] residence, and the number of pills recovered together with [petitioner's] alleged sale of the drug to a confidential informant severely undermined any possible defense that the drugs were for personal use and not for distribution." Pet. App. 54a; see J.A. 213, 219, 236-238. Petitioner's attorney also recognized that petitioner "probably would have gotten a greater sentence" following a conviction at trial. J.A. 239.[1]

The magistrate judge recommended that petitioner's conviction be vacated based on a showing of ineffective assistance of counsel under *Strickland*. Pet. App. 76a. The magistrate judge concluded that, because petitioner strongly desired to avoid removal, his view that he had "nothing to lose by going to trial" made it rational to reject the plea, regardless of his "likelihood of success" at trial. *Id.* at 75a (citation and internal quotation marks omitted); see *id.* at 76a; see also *id.* at 75a (noting that government had originally conceded prejudice before arguing that "the test for prejudice is objective, not subjective").

2. The district court denied relief. Pet. App. 20a, 48a. The court recognized—in accordance with this Court's decision in *Padilla* v. *Kentucky*, 559 U.S. 356,

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[1] Neither petitioner nor his attorney provided evidence that, had they understood that conviction under Section 841(a)(1) would result in removal, they could or would have negotiated a plea agreement that would have avoided that result.

360 (2010)—that counsel's incorrect advice amounted to deficient attorney performance under *Strickland*. Pet. App. 30a-31a. The court determined, however, that petitioner could not satisfy *Strickland*'s requirement to show that the deficient performance had prejudiced him. See *id.* at 31a-48a. Although the magistrate judge had recommended a finding of prejudice, the court criticized the magistrate judge's "entirely subjective" focus on petitioner's "ties to the United States and his desire to avoid deportation" as the basis for that conclusion, finding that a subjective approach conflicted with the "objective" prejudice inquiry that *Strickland* demands. *Id.* at 46a.

The district court explained that "[t]o demonstrate prejudice" under *Strickland*, "a prisoner must establish 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Pet. App. 25a (quoting 466 U.S. at 694). It observed that this Court "has emphasized" that establishing prejudice in the context of a guilty plea requires "'convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Id.* at 31a (quoting *Padilla*, 559 U.S. at 372). The court determined that petitioner could not carry that burden because he "ha[d] no rational defense to the charge and no realistic prospect of avoiding conviction and deportation." *Id.* at 47a.

"In light of the overwhelming evidence of [petitioner's] guilt," the district court reasoned, "a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." Pet. App. 46a. The court observed that petitioner's "per-

sonal use" defense would have been undermined by "the number of pills that were seized and the sales to the confidential informant." *Id.* at 45a. And it noted that petitioner had "received tangible benefits from the plea deal," which "appear[ed] to have greatly reduced [his] sentence." *Id.* at 46a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The government conceded that petitioner's counsel had rendered deficient performance, so the court considered only whether petitioner had established prejudice. *Id.* at 3a.

a. The court of appeals acknowledged that immigration consequences are "relevant to the prejudice inquiry," because "a 'reasonable' non-citizen charged with a deportation-triggering offense will, if properly advised, consider deportation consequences in deciding whether to plead guilty." Pet. App. 8a. The court accordingly recognized that such a defendant "might, as a result, be willing to go to trial even if he faces a low probability of success, one that might lead a citizen to accept a plea." *Ibid.* But the court declined to hold "that a decision to reject a plea deal that would trigger deportation consequences is *ipso facto* 'rational under the circumstances' regardless of the merits of the defense." *Ibid.* It instead "join[ed] the Second, Fourth, and Fifth Circuits in holding that a claimant's ties to the United States should be taken into account in evaluating, *alongside the legal merits*, whether counsel's bad advice caused prejudice." *Id.* at 10a; see *id.* at 4a (citing *United States* v. *Kayode*, 777 F.3d 719, 724-729 (5th Cir. 2014); *Kovacs* v. *United States*, 744 F.3d 44, 52-53 (2d Cir. 2014); and *United States* v. *Akinsade*, 686 F.3d 248, 255-256 (4th Cir. 2012)).

The court of appeals rejected an approach to *Strickland* prejudice that would effectively give dispositive weight to a defendant's assertion that he would have "throw[n] 'a Hail Mary' at trial" had he known the immigration consequences of a conviction. Pet. App. 4a. The court observed that in *Padilla*, this Court had "emphasized 'the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong'" and had "declined to craft a deportation-specific prejudice rule" for a defendant who, like petitioner here, "had lived in the United States legally for decades and had alleged that 'he would have insisted on going to trial if he had not received incorrect advice from his attorney.'" *Id.* at 9a (quoting *Padilla*, 559 U.S. at 359, 371 n.12). The court of appeals accordingly refused to endorse a legal rule that "would provide those in [petitioner's] position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences." *Ibid.*

b. The court of appeals concluded that petitioner had not established prejudice under an objective test. Pet. App. 10a. The court accepted "the district court's conclusion that the evidence of guilt was 'overwhelming'" and observed that "deportation would have followed just as readily from a jury conviction as from a guilty plea." *Id.* at 3a. The court found "[n]othing in the record [to] suggest[] that [petitioner] would have been acquitted at trial, or would have been able to obtain a conviction for an offense that did not require deportation." *Id.* at 7a (citation omitted). The court accordingly determined that, "aside from the off chance of jury nullification or the like, [petitioner]

stood to gain nothing from going to trial but more prison time." *Id.* at 3a.

"'[T]he possibility of arbitrariness, whimsy, caprice, nullification, and the like,'" however, "'are irrelevant to the prejudice inquiry' under *Strickland*." Pet. App. 7a (quoting *Strickland*, 466 U.S. at 695 (internal quotation marks omitted)). The "problem for [petitioner]," the court of appeals explained, "is that he has no *bona fide* defense, not even a weak one." *Id.* at 10a. The court further deemed the possibility that "the prosecutor might have agreed to allow [petitioner] to plead guilty to a non-deportable offense if his attorney had pursued the matter" to be "sheer speculation," with "nothing in the record * * * indicating that such an attempt would have changed the ultimate outcome of [petitioner's] case." *Id.* at 7a-8a.

SUMMARY OF ARGUMENT

A defendant cannot establish prejudice from deficient advice about the immigration consequences of a guilty plea when overwhelming evidence makes a favorable trial outcome unrealistic and no evidence exists that counsel could have struck a deal that would have avoided removal. *Strickland* prejudice requires a defendant to show an objectively rational reason to have rejected a plea, not one based on the hope of an irrational trial outcome or a speculatively better plea.

I. This Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), requires a defendant who seeks to set aside a conviction on ineffective-assistance-of-counsel grounds to prove both deficient attorney performance and resulting prejudice. In applying *Strickland*'s prejudice inquiry, the Court has consistently required a defendant to show that counsel's deficiencies "actually had an adverse effect on the de-

fense," *id.* at 693, by depriving him of an objectively viable litigation strategy. That requirement applies equally to a defendant claiming deficient immigration-related advice under *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). A *Padilla* claimant must provide more than a subjective after-the-fact assertion that he would have declined a plea if he had known it would result in removal. He must show that such a choice would have been "rational under the circumstances," *id.* at 372, because he had an objectively superior alternative to the government's plea offer.

Strickland relief is not appropriate where the only available alternatives would have led to a worse result, not a better one. This Court has carefully cabined the availability of such relief, in recognition of its significant intrusion on finality interests, which weigh particularly heavily in convictions based on guilty pleas. Attaching dispositive weight to a defendant's subjective assertions that he would gone to trial, regardless of any objective likelihood of success, would make *Strickland* relief all but automatic in such cases. That result would not only contravene *Padilla* itself—which highlighted the prejudice inquiry as a significant limitation on the effect of its holding, see 559 U.S. at 371-372—but would lead to unjust results. A defendant who could not realistically have done any better at the time of the plea should not be entitled to return to his original position and make a new choice, long after memories may have faded and the prospects for successful prosecution may have changed.

II. Petitioner errs in suggesting that a defendant's subjective desire to avoid removal—even when removal was objectively unavoidable—justifies *Strickland* relief. When the evidence is overwhelming, either

a plea or a trial would have led to removal, and rejection of the plea would have resulted in a harsher sentence. Finding *Strickland* prejudice in those circumstances would erode the significance of prejudice as an objective test. A defendant is not entitled to rely on the possibility of random or arbitrary results, such as jury nullification, as a basis for relief under *Strickland*.

A defendant similarly cannot justify relief under *Strickland* based on speculation that he could have negotiated a more favorable plea agreement if he had appreciated the immigration consequences of conviction. The Court has never permitted a *Strickland* claimant to set aside a conviction based solely on conjecture about hypothetical alternative plea offers, an approach under which any number of such claimants could establish prejudice without any supporting evidence. Regardless of his desire for a disposition that would avoid removal, a defendant has no right to any plea offer, let alone a particular plea offer substantially more advantageous than the one he actually received.

III. Petitioner has not shown that, in the circumstances of this case, he had an objectively viable alternative to his guilty plea that would have avoided removal. Petitioner's suggestion that he was prejudiced by accepting the plea offer rather than going to trial is misguided. A jury faithfully applying the law to the facts would have had no basis for acquitting petitioner or convicting him of a less serious offense. And petitioner's speculation that he could have obtained a more favorable plea offer is likewise misplaced. The government here did not offer a plea agreement under

which petitioner could have avoided removal, and no evidence suggests that it would have.

ARGUMENT

PETITIONER FAILED TO SHOW PREJUDICE FROM HIS GUILTY PLEA WHEN HE WOULD HAVE EQUALLY BEEN EXPOSED TO REMOVAL BY DECLINING THE PLEA

Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a "convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components." *Id.* at 687. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant "must show that [counsel's performance] actually had an adverse effect on the defense." *Id.* at 693. In *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), the Court held that a defendant can show deficient performance of counsel when his attorney failed to advise, or misadvised, him about the potential removal consequences of pleading guilty. *Id.* at 360; see *id.* at 369-371. *Padilla* further held that when a defendant makes that showing, his "entitle[ment] to relief depends on whether he has been prejudiced" under *Strickland*. *Id.* at 360.

Although petitioner in this case has established deficient performance under *Padilla*, he is not entitled to have his conviction set aside, because he has not shown that his attorney's misadvice "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. A decision to go to trial in the face of "overwhelming" (Pet. App. 3a) evidence of guilt would have resulted in a *longer* prison sentence, with the same removal consequence he currently faces. A better outcome could have resulted only from an irrational result at trial, which is not cognizable consideration

under *Strickland*. And petitioner's "sheer speculation," *id.* at 8a, that he could have obtained a nontrial disposition far more favorable in all respects than the one actually offered by the government is neither legally nor factually a tenable basis for relief.

I. A SHOWING OF *STRICKLAND* PREJUDICE REQUIRES PROOF THAT ATTORNEY ERROR ADVERSELY AFFECTED A VIABLE DEFENSE STRATEGY

Strickland makes clear that an attorney's "deficient performance prejudiced the defense," 466 U.S. at 687, and warrants reversal of a conviction, only when it caused the defendant to forgo an objectively rational strategy for improving his position. A defendant who pleaded guilty in the face of overwhelming evidence, but who now claims that, with awareness of mandatory removal consequences, he would have gone to trial or tried to secure a better plea agreement cannot make that showing. A defendant "has no entitlement to the luck of a lawless decisionmaker," *id.* at 695, and "no right to be offered a plea," *Missouri* v. *Frye*, 566 U.S. 134, 148 (2012), and thus cannot premise *Strickland* prejudice on the hope of an irrational acquittal or a hypothetical plea offer.

A. This Court Has Consistently Conditioned *Strickland* Relief On A Showing That Counsel's Deficiencies Deprived The Defendant Of A Realistic Litigation Option

1. In *Strickland*, the Court considered the standard for establishing prejudice in the context of attorney deficiencies "at the trial or sentencing." 466 U.S. at 671; see *id.* at 691-696. The Court held that to prevail, the "defendant must show * * * a reasonable probability that, but for counsel's unprofessional er-

rors, the result of the proceeding would have been different." *Id.* at 694.

The Court explained that the defendant's proof must "undermine confidence in the outcome" by demonstrating that an objectively "reasonabl[e], conscientious[], and impartial[]" decisionmaker might well have reached "a result more favorable to the defendant." *Strickland*, 466 U.S. at 694, 695. "[T]he ultimate focus of inquiry," the Court emphasized, "must be on the fundamental fairness of the proceeding whose result is being challenged," *id.* at 696, as informed by the objective merits of the defense strategy that counsel's errors foreclosed, see *id.* at 694-695.

To that end, the inquiry "must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland*, 466 U.S. at 695. Thus, "evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination." *Ibid.* Even the testimony of the decisionmaker himself (*e.g.*, the sentencing judge) "is irrelevant to the prejudice inquiry." *Id.* at 700.

2. In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), the Court incorporated *Strickland*'s objective approach into the analysis of whether a defendant has been prejudiced by deficient attorney performance during the plea process. The Court held that a defendant who alleges that his guilty plea was "based on ineffective assistance of counsel" must satisfy *Strickland*'s prejudice requirement by demonstrating "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 58, 59. As petitioner acknowledges (Br. 17), prejudice analysis under *Hill* "is objective."

The Court did not hold in *Hill* that a defendant can show prejudice simply by making a subjective post hoc assertion that, but for counsel's deficiencies, he would have gone to trial. The Court instead emphasized that "[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59. As the Court recognized, the analysis of whether an attorney's deficiencies caused a defendant to plead guilty is tied to whether an objectively reasonable attorney would have viewed—and thus recommended—trial as a viable option. See *ibid.*; cf. *United States* v. *Cronic*, 466 U.S. 648, 656 n.19 (1984) ("If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.").

"For example," the Court explained, "where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill*, 474 U.S. at 59. "This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Ibid.* "Similarly," the Court continued, "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Ibid.* The Court reiterated *Strickland*'s re-

quirement that "these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 59-60 (quoting *Strickland*, 466 U.S. at 695).

As an illustration of the correct approach, the Court in *Hill* endorsed the reasoning of a Seventh Circuit decision rejecting a *Strickland* claim where it was "inconceivable * * * that the defendant would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted, or if convicted, would nevertheless have been given a shorter sentence than he actually received." 474 U.S. at 59 (brackets omitted) (quoting *Evans* v. *Meyer*, 742 F.2d 371, 375 (7th Cir. 1984)); see *Evans*, 742 F.2d at 374-375. And on the facts of *Hill* itself, which involved a defendant's claim that he was misinformed about parole eligibility, the Court emphasized the absence of evidence that the defendant would reasonably have viewed trial as a better option than pleading guilty. See *Hill*, 474 U.S. at 60. Not only had the defendant failed generally to allege that correct parole information would have led him to choose a trial (or that he had "placed particular emphasis on his parole eligibility" in making his plea decision), but the misinformation would "seem to have affected * * * his calculation" of the consequences he faced for conviction following either a plea *or* a trial. *Ibid.*

3. In *Padilla*, the Court reaffirmed the objective focus of the *Strickland* prejudice inquiry in the specific context of a claim premised on deficient advice about the removal consequences of a plea.

Padilla held that an attorney has a "duty * * * to provide her client with available advice about an issue

like deportation, and the failure to do so clearly satisfies the first prong of the *Strickland* analysis." 559 U.S. at 371 (citation and internal quotation marks omitted). The Court declined, however, to decide whether the defendant had sufficiently alleged prejudice. *Ibid.* The Court instead remanded the case—in which the defendant had "been a lawful permanent resident of the United States for more than 40 years" and "alleg[ed] that he would have insisted on going to trial if he had not received incorrect advice from his attorney"—for a full prejudice analysis. *Id.* at 359; see *id.* at 360, 374-375; see also *Padilla* v. *Commonwealth*, 381 S.W.3d 322, 323, 330 (Ky. Ct. App. 2012) (granting relief on remand to defendant in *Padilla*, following further factual development, where evidence of guilt was "strong," but "far from conclusive").

The Court explained that "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372. The Court emphasized that proper application of that standard would help to prevent a "flood" of litigation seeking to unravel guilty pleas on the ground that the defendant had not received correct immigration advice. *Id.* at 371; *id.* at 371-372. "Surmounting *Strickland*'s high bar," the Court cautioned, "is never an easy task," and "it is often quite difficult for [defendants] who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong." *Id.* at 371 & n.12.

4. In prescribing an objective approach to prejudice in cases involving deficient advice about the immigration consequences of a plea, the Court in *Padilla* cited its prior decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000). *Padilla*, 559 U.S. at 372. In *Flores-*

Ortega, the Court applied *Strickland* to a defendant's claim that "counsel was constitutionally ineffective for failing to file a notice of appeal." 528 U.S. at 477. The prejudice inquiry in *Flores-Ortega* "mirror[ed] the prejudice inquiry applied in" *Hill*, requiring the defendant to "demonstrate * * * a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484, 485. As in other contexts, the Court required that such a demonstration of prejudice have an objective basis. See *id.* at 486.

The Court anticipated that a defendant would typically demonstrate prejudice in that circumstance by showing that he had objectively "nonfrivolous grounds for appeal." *Flores-Ortega*, 528 U.S. at 486. The Court, however, deemed it "unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case." *Ibid.* It accordingly declined to "foreclose the possibility" that a defendant might show prejudice by identifying "other substantial reasons to believe that he would have appealed." *Ibid.* To show that he would in fact have pursued an appeal, however, a defendant cannot rely solely on "evidence that he sufficiently demonstrated to counsel his *interest* in an appeal." *Ibid.* (emphasis added). Such evidence of subjective interest "alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal." *Ibid.* Rather, as *Padilla* confirms, the defendant must show that his decision would have been objectively "rational under the circumstances."

559 U.S. at 372 (citing *Flores-Ortega*, 528 U.S. at 480, 486).

5. More recent decisions addressing ineffective assistance claims in the context of plea bargaining have maintained the prejudice inquiry's focus on the objective viability of the opportunity the defendant claims to have lost. In *Lafler* v. *Cooper*, 566 U.S. 156 (2012), for example, the defendant claimed that his attorney's misadvice had caused him to pass up a plea offer and opt for trial (the converse of the situation in *Hill* and *Padilla*). *Id.* at 160-161. The Court held that the prejudice inquiry required the defendant to show, *inter alia*, "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164. Similarly, in *Missouri* v. *Frye*, *supra*, the defendant claimed that his attorney had failed to inform him of a plea offer, leading him to plead guilty later on less favorable terms. See 566 U.S. at 138-139. The Court held that the prejudice inquiry required the defendant to show, *inter alia*, "a reasonable probability that," but for counsel's deficiencies, he would have accepted the plea offer, and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at 147.

B. Granting *Strickland* Relief To A Defendant Who Lacked A Realistic Litigation Alternative Would Be Unsound

The Court's consistent requirement to show deprivation of an objectively realistic strategy as a prerequisite for *Strickland* relief makes both legal and practical sense.

1. The prejudice inquiry is founded on the principle that only attorney errors that affect the outcome should be grounds for relief. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. A claim of ineffective assistance thus requires a showing that the defendant "los[t] benefits he would have received in the ordinary course but for counsel's ineffective assistance." *Cooper*, 566 U.S. at 169. A defendant who cannot show a reasonable likelihood that he is worse off—or a defendant who, by all objective measures, is *better* off—because of how his case turned out has no grounds for vacating his conviction.

This Court has cautioned that "[c]ases involving Sixth Amendment deprivations," no less than cases involving other constitutional rights, "are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Granting *Strickland* relief to a defendant who has lost nothing of objective value would infringe, entirely unnecessarily, on an interest that *Strickland* identified as one of "profound importance"—the interest in "finality in criminal proceedings." 466 U.S. at 693-694. As the Court has explained, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (citation omitted); see, *e.g.*, *Hill*, 474 U.S. at 58. *Strickland*-based

attacks on a criminal judgment are therefore limited to attorney errors that affected the outcome, not solely the process, of a criminal proceeding.[2]

The interest in finality "has special force with respect to convictions based on guilty pleas." *Timmreck*, 441 U.S. at 784; see, *e.g.*, *Bousley* v. *United States*, 523 U.S. 614, 621 (1998). The "substantial burden on the claimant to show ineffective assistance" in the context of a guilty plea reflects the Court's recognition that the "plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges." *Premo* v. *Moore*, 562 U.S. 115, 132 (2011). That is especially the case because guilty pleas account for the "vast majority of criminal convictions," yet "rarely" give rise to "concern that unfair procedures may have resulted in the conviction of an innocent defendant." *Hill*, 474 U.S. at 58 (citation omitted). As the Court has recognized, a "counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis omitted). Such an admission should not be lightly set aside when only its strategic wisdom, and not its reliability, has been questioned. See, *e.g.*, *Moore*, 562 U.S. at 132; *Hill*, 474 U.S. at 58-60. And when either a plea or trial will produce the same undesired consequence, not even its strategic wisdom can be challenged.

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[2] In *Weaver* v. *Massachusetts*, No. 16-240 (oral argument scheduled for Apr. 19, 2017), this Court is considering whether deficient attorney performance that results in a structural error must also show actual prejudice. No claim of that sort exists in this case.

2. Concerns about undermining the finality of guilty pleas are particularly significant in challenges to a plea based on misadvice about removal. The immigration consequences of a conviction apply equally to conviction following a plea *or* a trial. Deficient attorney advice about immigration consequences, therefore, does not imply that a competent attorney would have recommended that the defendant reject a favorable plea offer. See *Hill*, 474 U.S. at 59 (focusing on whether competent attorney would have advised defendant to go to trial). As the Court observed in *Strickland* and reiterated in *Padilla*, "attorney errors are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Padilla*, 559 U.S. at 371-372 (brackets and ellipses omitted) (quoting *Strickland*, 466 U.S. at 693). That is especially true where the circumstances of the case provide the defendant with no viable path to avoid an undesired consequence of conviction.

Accordingly, a *Padilla* claimant must show that he had an objectively realistic reason to reject a plea offer. Otherwise, any defendant who credibly claims that he placed the highest priority on remaining in the United States would automatically establish prejudice under *Strickland* solely because of the lost opportunity to "throw 'a Hail Mary' at trial." Pet. App. 4a. That would undermine *Padilla*'s reassurance that a rigorous prejudice requirement would protect against a proliferation of immigration-advice-based collateral attacks. See 559 U.S. at 371-372. It would also contradict the underpinnings of *Strickland* because it would grant relief to a defendant who was not actually harmed by a constitutional violation. And as a practical matter, setting aside a plea in those circumstances would ultimately give the defendant either no benefit at all

(if he is tried and loses) or else a windfall benefit he does not deserve (if changed conditions allow him to avoid or prevail at a trial).

The passage of time since the original prosecution makes the risk of such a windfall benefit particularly acute. A *Padilla* claimant may bring his collateral attack long after the original plea. See, *e.g.*, *Kovacs* v. *United States*, 744 F.3d 44, 48-49 (2d Cir. 2014) (12 years); *United States* v. *Akinsade*, 686 F.3d 248, 251 (4th Cir. 2012) (nine years). By that point, the "government may find it harder to re-prosecute." Pet. App. 9a. As this Court has recognized, long gaps "may 'work to the accused's advantage' because 'witnesses may become unavailable or their memories may fade.'" *Vermont* v. *Brillon*, 556 U.S. 81, 90 (2009) (quoting *Barker* v. *Wingo*, 407 U.S. 514, 521 (1972)). Requiring a showing that the defendant could objectively have done better at the time of the original plea decision minimizes the prospect that such factors will result in the unwarranted acquittal of a defendant who has reliably admitted his guilt.

II. A *PADILLA* CLAIMANT WHO LACKS AN OBJECTIVELY VIABLE STRATEGY FOR AVOIDING REMOVAL CANNOT SHOW HE WAS PREJUDICED BY A PLEA

Petitioner errs in contending that a *Padilla* claimant with no viable defense at trial, and no evidence he could have obtained a better plea agreement, can show that he was prejudiced by accepting a plea offer with favorable sentencing terms. A defendant's hope for an irrational or unjust trial outcome, no matter how sincere, is not cognizable under *Strickland*. And this Court has never found prejudice under *Strickland* based on hypothesized plea deals that the government never offered.

A. A *Padilla* Claimant's Subjective Preference For Trial Cannot In Itself Establish That He Was Prejudiced By Accepting An Objectively Favorable Plea Offer

Petitioner contends (Br. 29) that a defendant in his position may put such a high premium on avoiding removal that he would "take[] his chances at trial" no matter how long the odds. But that subjective preference is not enough to establish a defendant's entitlement to *Strickland* relief when the defendant lacks an objectively cognizable chance of prevailing at trial.

1. A *Padilla* claimant's strong subjective desire to remain in the United States is a necessary precondition to showing prejudice from a deficiently counseled plea. See Pet. App. 2a-4a, 8a, 10a; see also *id.* at 30a, 47a. Unless the defendant has such a desire, accurate advice about immigration consequences would not cause a defendant to reject a plea that has favorable criminal consequences. In contrast, a defendant who strongly desires to remain in this country "might * * * be willing to go to trial even if he faces a low probability of success, one that might lead a citizen to accept a plea." *Id.* at 8a. But a defendant cannot "elide the difficult task of showing prejudice entirely," *id.* at 9a, by attaching dispositive weight to his subjective desire to avoid removal, in the absence of any realistic way to fulfill that desire.

Petitioner posits (*e.g.*, Br. 25) that, notwithstanding the government's ability to present overwhelming evidence of his guilt, a defendant might pass up a favorable plea offer on the hope that something random and unexpected (*e.g.*, the disappearance of a key witness) might allow him to prevail at trial. Although that choice might be characterized as "rational" (*e.g.*, Pet. Br. 2) in some sense, it cannot alone provide the basis for

Strickland relief. As *Strickland* makes clear, a defendant's reliance on "some conceivable" possibility of a more favorable trial outcome, perhaps produced by luck, happenstance, or error, "is not enough" to show prejudice under *Strickland*. 466 U.S. at 693. A defendant cannot establish that he was deprived of a "fair[] and regular[]" pretrial process, *Cooper*, 566 U.S. at 169, by claiming that he was deprived of the chance to seek a result based on "arbitrariness" or jury "'nullification'" that would itself fall outside the normal administration of justice, *Strickland*, 466 U.S. at 695.

"A defendant has no entitlement to the luck of a lawless decisionmaker," *Strickland*, 466 U.S. at 695, or undeserved luck of any other sort. The Court has rejected an approach under which "[v]irtually every act or omission of counsel would meet th[e] test" for prejudice. *Id.* at 693. Instead, the Court has required a defendant to show that the act or omission "actually had an adverse effect on the defense," *ibid.*—something a *Padilla* claimant with no objectively viable strategy for avoiding removal cannot do.

2. In arguing that subjective removal concerns should override all objective considerations of litigation strategy, petitioner effectively seeks a special *Padilla*-specific exception from the normal *Strickland* standard. *Padilla* itself disclaims any such exception, see 559 U.S. at 371-372 (explicitly invoking *Strickland*), and petitioner offers no sound basis for creating one.

As a general rule, *Strickland* prejudice principles apply whenever an attorney provides deficient advice about the direct adverse consequences of a conviction, *e.g.*, sentencing. See *Hill*, 474 U.S. at 53, 58-60 (applying *Strickland*'s outcome-based prejudice test and

denying relief to a defendant who allegedly received deficient advice about his parole-eligibility date, where the timing of parole eligibility applied equally to a conviction after trial or a plea). Petitioner's suggestion (Br. 28) that *Padilla* claimants should be viewed through a different lens because removal could hypothetically lead to death or other physical harm is misplaced. An alien who faced physical harm at the hands of his home country following conviction of an aggravated felony would (at a minimum) be eligible to seek protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 20 (1988), 1465 U.N.T.S. 85; 8 C.F.R. 1208.17(a). See *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1682 n.1 (2013); see also *ibid.* (noting that withholding of removal under 8 U.S.C. 1231(b)(3) is also available for some aliens convicted of aggravated felonies).

Petitioner's proposed approach to *Padilla* claims would also lead to unjustified anomalies in *Strickland*'s application. A defendant who *rejects* a plea offer based on constitutionally deficient advice about the likely ramifications of a trial as compared to a plea cannot establish prejudice unless he shows (*inter alia*) that the consequences of the option he passed up "would have been less severe than under the judgment and sentence that in fact were imposed." *Cooper*, 566 U.S. at 164. But under petitioner's proposed approach to *Padilla* claims, a defendant who *accepts* a plea based on the same type of error (*i.e.*, constitutionally deficient advice about the likely ramifications of a trial as compared to a plea) would be able to establish prejudice without any such showing. Indeed, such a

defendant would be able to establish prejudice even where the consequences of the option he passed up would have been *more* severe than under the judgment and sentence actually imposed.

3. Petitioner proffers (Br. 26-27) two reasons why a defendant who is certain to be removed would prefer *losing* at trial, with a resulting longer prison sentence, to a plea with a shorter prison sentence. But petitioner's reasons for viewing an objectively worse outcome as a better outcome are far too insubstantial to support the special exception to *Strickland* prejudice analysis that he seeks.

First, no reasonable attorney would advise, and no reasonable defendant would choose (Br. 27), a much longer prison sentence on the vague hope that, during the extra time in prison, legislative or executive policy towards aliens convicted of aggravated felonies would change in a favorable way. It is particularly implausible that they would do so in the hope that the law might change in a way that would advantage an alien who had insisted on going to trial over one who had accepted responsibility for his crime. Cf. U.S. Dep't of Justice, *Standards for Consideration of Clemency Petitioners* § 1-2.112, https://www.justice.gov/pardon/about-office-0 (last updated Jan. 13, 2015) (attaching weight in clemency decisions to prisoner's acceptance of responsibility).

Second, it is not reasonable to presume (Br. 26-27) as a general matter that a defendant faced with removal would prefer limited prison visitation rights in the United States to freedom elsewhere. Such a presumption is especially unwarranted in the federal system, where a defendant could easily find himself incarcerated far from his family and friends. See Fed-

eral Bureau of Prisons, U.S. Dep't of Justice, *Designations*, https://www.bop.gov/inmates/custody_and_care/designations.jsp (last visited Mar. 3, 2017) (explaining that proximity considerations are limited to placement with "500 miles" of a prisoner's "release residence" and are not guaranteed).

4. Requiring a defendant to prove that a trial would have been a strategically viable alternative to pleading guilty provides a useful objective foundation for what would otherwise be an essentially subjective inquiry. Many *Padilla* claimants doubtless believe in complete good faith that they would have opted for trial had they known the immigration consequences of a plea. But hindsight bias and other factors can potentially obscure efforts of defendants and their attorneys to reconstruct their decisionmaking processes years after the fact. And petitioner's position "would provide those in [his] position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences." Pet. App. 9a.

Although a defendant who challenges a guilty plea under *Strickland* is necessarily displaying his willingness to trade his plea for a trial at the time of the collateral attack, see *Padilla*, 559 U.S. at 373, that does not in itself show he would have made the same trade at the time he originally faced that decision. By the time of the collateral proceedings, the parties are no longer in their original positions, and it will be impossible to truly restore them to their former state. Not only will the government have more difficulty prosecuting the defendant long after the crime, see p. 26, *supra*, but it may be less willing to devote the resources to doing so, see Pet. App. 9a, and the de-

fendant may be in line for a shorter sentence than he would originally have received, see, *e.g.*, *Pepper* v. *United States*, 562 U.S. 476, 480-481 (2011) (holding that courts may take postsentencing rehabilitation into account on resentencing). Although those factors should not preclude a deserving defendant from obtaining *Strickland* relief, they counsel in favor of retaining the additional layer of reliability that the objectively focused *Strickland* prejudice inquiry traditionally provides.

B. A Defendant Cannot Establish *Strickland* Prejudice By Hypothesizing Theoretical Plea Deals With No Evidentiary Basis

Petitioner alternatively contends (Br. 24) that, separate and apart from any subjective desire to go to trial, a *Padilla* claimant can show prejudice by identifying "offenses with no or lesser deportation consequences to which [he] could have pled guilty for the same conduct." By "could," he apparently means an offense that *might* have provided the basis for a theoretical plea agreement, even if nothing indicates that the prosecution would have offered, or the court would have accepted, such a plea. See, *e.g.*, Br. 33 (suggesting that relief can be premised on "proposals" that a "creative defense attorney" would have asked the "prosecutor to consider"); see also Br. 31-33. Such an approach would depart sharply from anything this Court has endorsed under *Strickland*.

1. When this Court has recognized the possibility of *Strickland* relief based on the missed opportunity for a particular plea agreement, it has done so in the context of a plea agreement that the government actually offered. The prosecution in *Cooper*, for example, had offered a plea agreement under which the

defendant's recommended sentence would have been approximately three times lower than the mandatory-minimum sentence to which he was subject after trial. 566 U.S. at 161, 174. And the prosecution in *Frye* had offered, *inter alia*, a plea agreement under which the defendant would have been convicted of a misdemeanor (with 90 days in prison) rather than the felony to which he ultimately pleaded (with three years in prison). 566 U.S. at 138-139.

In both cases, the Court tied the prejudice analysis to the actual preexisting plea offer. In *Cooper*, where the defendant claimed he was prejudiced by having opted for trial based on misadvice about the offense elements, the Court required "a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), [and] that the court would have accepted its terms." 566 U.S. at 164. And in *Frye*, where the defendant claimed that he was prejudiced by his attorney's failure to inform him about a more favorable plea offer, the Court required "a reasonable probability [the defendant] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel" and "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion." 566 U.S. at 147.

An approach to *Strickland* prejudice untethered from an actual plea offer—or, at least, specific evidence that the prosecution would have made a particular offer—would be inconsistent with *Cooper* and *Frye*. Under such an approach, it would not matter that the

defendant in *Cooper* received an actual plea offer that contemplated a much more favorable disposition than the one he achieved at trial. Instead, even in the absence of such a plea offer, the defendant could obtain *Strickland* relief based solely on speculation that an attorney who properly understood the elements of the offense might, in theory, have procured him a good deal.

2. Granting *Strickland* relief based solely on conjecture about counterfactual plea deals would also be at odds with this Court's decision in *Premo* v. *Moore*, *supra*. The defendant in that case alleged that his attorney deficiently failed to seek suppression of a confession before advising him to accept a plea offer. 562 U.S. at 118. This Court concluded that the defendant was not entitled to federal habeas relief. *Id.* at 118, 132-133. In reaching that conclusion, the Court rejected an approach, suggested by a lower-court judge, under which a defendant could prove *Strickland* prejudice by showing "a reasonable possibility that he would have obtained a better plea agreement but for his counsel's errors." *Id.* at 131. The Court admonished that its precedent "did not establish, much less clearly establish," such an open-ended standard. *Ibid.*

As the Court recognized in *Moore*, the "uncertainty inherent in plea negotiations" is ill-suited to judicial superintendence through *Strickland*, in the absence of a solid evidentiary basis in which to ground a court's conclusions. 562 U.S. at 129. "The art of negotiation is at least as nuanced as the art of trial advocacy," and it is one into which courts have substantially less visibility. *Id.* at 125; see *ibid.* (observing that plea negotiations are more "removed from immediate judicial

supervision" than trial strategy). As a result, "the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real." *Ibid.* In addition, "ineffective-assistance claims that lack necessary foundation may bring instability to the very process the [ineffective-assistance] inquiry seeks to protect." *Ibid.*

That concern is magnified when a district court is asked not simply to second-guess the actions of defense counsel, but to hypothesize plea agreements that the prosecution never offered. As the Court recognized in both *Cooper* and *Frye*, "a defendant has no right to be offered a plea." *Frye*, 566 U.S. at 148 (citing *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977)); see *Cooper*, 566 U.S. at 168. The prejudice analysis in those decisions accordingly respects prosecutorial discretion by requiring a defendant who did, in fact, receive a favorable plea offer to show a reasonable probability that the prosecution would not later have withdrawn it. See *Cooper*, 566 U.S. at 164 (requiring proof, *inter alia*, that "the prosecution would not have withdrawn [the offer] in light of intervening circumstances"); *Frye*, 566 U.S. at 151 ("If * * * the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no *Strickland* prejudice."). That requirement cannot be squared with an approach under which a defendant can obtain *Strickland* relief even without evidence that prosecution would have *offered* the more favorable plea in the first place.

3. Such an approach would be as unwarranted in a case involving a *Padilla* claim as it would be in any other. As petitioner observes (Br. 19), the Court in *Padilla* noted that an attorney's ignorance of the im-

migration consequences of a conviction can hamper his ability to plea bargain effectively. See 559 U.S. at 373. But it did so solely in support of its holding that such ignorance satisfies the deficient-performance component of *Strickland*. See, *e.g.*, *id.* at 360. The Court did not suggest that such considerations would provide the basis for an automatic, or near-automatic, finding of prejudice in *Padilla* cases whenever a defendant can speculate about a possible alternative plea. As *Strickland* itself recognized, certain considerations may "affect the performance inquiry" but be "irrelevant to the prejudice inquiry." 466 U.S. at 695. And *Padilla* deficiencies are not unique in their ability to affect plea negotiations. Any number of attorney deficiencies —such as a misunderstanding about the elements of the offense, see, *e.g.*, *Cooper*, 566 U.S. at 161—could have a similar, or greater, effect.

III. PETITIONER CANNOT SHOW THAT HE HAD A STRATEGICALLY VIABLE ALTERNATIVE TO ACCEPTING THE GOVERNMENT'S PLEA OFFER

Petitioner in this case has not established that he was prejudiced by his attorney's misadvice about the removal consequences of his plea. As both courts below recognized, the record reveals that petitioner had no objectively viable strategy for avoiding removal. Had petitioner proceeded to trial, the "overwhelming" evidence against him would have led a rational jury to deliver a guilty verdict on the charged offense, after which petitioner would still have faced removal, but with a harsher prison sentence. Pet. App. 3a. And "nothing in the record" supports petitioner's legally irrelevant "speculation" that, had his attorney advised him correctly, the government would have offered him

a plea agreement with no (or reduced) immigration consequences. *Id.* at 8a.

A. Petitioner Has Not Shown A Reasonable Probability That He Could Have Achieved A Better Result By Going To Trial

Petitioner cannot establish that he was prejudiced by forgoing a trial, because the record shows that he would have been *worse* off insisting on trial than he was accepting the government's plea offer. As both the district court and the court of appeals recognized, trial was a losing proposition for petitioner. See Pet. App. 3a, 45a-47a. Petitioner had "no rational defense to the charge and no realistic prospect of avoiding conviction and deportation." *Id.* at 47a. Rather, "[i]n light of the overwhelming evidence of [his] guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." *Id.* at 46a; see *id.* at 3a (accepting district court's conclusion under clear-error standard of review). Petitioner provides no basis for concluding otherwise.

1. The search of petitioner's townhouse alone produced compelling evidence that petitioner possessed drugs with intent to distribute them (and did distribute them to friends), in violation of 21 U.S.C. 841(a)(1). That search uncovered, *inter alia*, 88 ecstasy pills (an amount that government witnesses would have testified to be inconsistent with personal use), $32,432 in cash, and a loaded rifle. Pet. App. 14a; see J.A. 109. Expert witnesses would have testified that petitioner's activities were consistent with "the drug trafficking modus operandi." J.A. 79-80; see J.A. 109. And in the wake of the search, petitioner, after receiving *Miranda* warnings, admitted that "[a]ll of the narcotics"

were his and that he "gave * * * away" ecstasy to friends, J.A. 75, thereby conceding all the necessary elements of the Section 841(a)(1) offense, see pp. 3-4, *supra*.

Although petitioner briefly suggests (Br. 30) that he might have improved his odds at trial by challenging the search warrant, he had no plausible grounds for doing so. See Pet. App. 45a ("At the evidentiary hearing, [petitioner's] attorney testified that there did not appear to be a valid motion to suppress."). The probable cause for the warrant was supported by a controlled drug purchase from petitioner by a confidential informant under the observation of federal agents. J.A. 217; see Pet. App. 13a-14a. Petitioner's attorney had performed a "thorough analysis" of the warrant, J.A. 241, "didn't think [it] was defective," J.A. 216, and "th[ought] [the agents] had probable cause to search," *ibid.*

The evidence from the search represented only the surface of the iceberg. The government had ample additional evidence against petitioner. First, the government could have presented evidence about "the sales to the confidential informant." Pet. App. 45a. The informant had told authorities about purchasing roughly 200 ecstasy pills from petitioner over the course of eight years. *Id.* at 12a-13a. The informant had also carried out a controlled drug purchase from petitioner at his home, under the surveillance of federal agents, which had involved the exchange of $300 for 15 ecstasy pills. *Id.* at 13a. Second, even the witnesses petitioner himself proposed to present would have bolstered the government's case. They would, by petitioner's own admission, have testified that petitioner "may party using ecstasy and give it away to friends,"

J.A. 180—*i.e.*, that he possessed ecstasy and distributed it. And the government could have called those witnesses to testify even if petitioner did not.

2. Petitioner testified at the evidentiary hearing that, had he known the immigration consequences of his plea, he would have gone to trial with what he viewed as "strong evidence" of his innocence. J.A. 180. He had no such evidence.

Petitioner's attorney viewed the only "colorable defense at trial" to be an argument "that the pills that were found were intended for personal use." Pet. App. 45a; see J.A. 218. Even that, he acknowledged, would be "difficult"; the attorney did not "know how we get that pas[t] the jury." J.A. 218. That may be a considerable understatement of the obstacles a personal-use defense would have encountered.

As both lower courts recognized, a personal-use defense would have been untenable in light of the amount of drugs, the sales to the confidential informant, and the admitted distribution to friends. See Pet. App. 10a, 45a. Furthermore, it is unclear how petitioner could have presented any affirmative evidence to support such a defense. Had he taken the stand to testify that the drugs were for personal use, he would have been impeached by his prior admission during his proffer session with the government that he in fact sold drugs for money. J.A. 223, 231-232, 238.

Petitioner suggests (Br. 35) in passing that more investigation by his attorney might have uncovered other defenses. But he fails even now to identify any realistic way in which his position might have improved. Indeed, it is just as likely—if not substantially more likely—that the government's case would have grown stronger, rather than weaker, as trial ap-

proached. See, *e.g.*, *Moore*, 562 U.S. at 129 ("Had the prosecution continued to investigate, its case might well have become stronger."); *id.* at 124. For example, given petitioner's eight-year history of drug distribution, the government would likely have found more fact witnesses who could have undermined petitioner's personal-use defense and corroborated the already insurmountable evidence of petitioner's guilt.

3. Petitioner has asserted—consistent with the evidence of his close ties to this country and his focus on removal in his original evaluation of the government's plea offer, see, *e.g.*, Pet. App. 2a-4a, 30a—that had he known the removal consequences of his plea, he would have insisted on a trial regardless of his chances of prevailing. But because such insistence would have been counterproductive, forgoing that option did not prejudice him.

Petitioner clearly had a powerful desire not to be removed from the United States for his drug-dealing activities. But going to trial was not a cognizable way to avoid that result. "The problem for [petitioner] is that he has no *bona fide* defense, not even a weak one," Pet. App. 10a, and "deportation would have followed just as readily from a jury conviction as from a guilty plea," *id.* at 3a. Given the profusion of evidence against him, his only real choice was between conviction by plea, with a shorter prison term, or conviction by trial, with a longer prison term. "[A]side from the off chance of jury nullification or the like, [petitioner] stood to gain nothing from going to trial but more prison time." *Ibid.*; see *id.* at 46a (district court observing that petitioner's plea "appears to have greatly reduced [his] sentence"); see also J.A. 239 (petitioner's attorney acknowledging that petitioner's sentence

would likely have been higher had he gone to trial); see also p. 6, *supra* (Guidelines calculations).

Petitioner's hope (*e.g.*, Br. 30) that the jury would disregard overwhelming evidence of guilt, or that the government's case would fortuitously fall apart, is not a valid basis for finding *Strickland* prejudice. As previously discussed, see pp. 16-22, *supra*, the prejudice inquiry requires that "predictions of the outcome at a possible trial, where necessary, should be made objectively." *Hill*, 474 U.S. at 59-60. Such objectivity does not allow consideration of any "arbitrariness" or "luck" that might have led to an undeserved result. *Strickland*, 466 U.S. at 695.[3]

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[3] To the extent petitioner suggests (Br. 28-29) that he was prejudiced because he would have *preferred* a longer prison sentence, that suggestion is misplaced. Even if such an argument were cognizable under *Strickland* (but see pp. 30-31, *supra*), petitioner did not advance it the in the court of appeals, see Pet. C.A. Br. 35-39, and he makes no attempt to tie it to any preferences he expressed at the evidentiary hearing, see J.A. 180 (claim by petitioner that he would have gone to trial with his "strong evidence"); cf. *Hill*, 474 U.S. at 60 (rejecting ineffective-assistance claim where defendant "failed to allege the kind of 'prejudice' necessary to satisfy" *Strickland*). And contrary to his suggestion (Br. 28-29), his lengthy period of immigration detention during the current postconviction proceedings—which appears to be the product of a belief that those proceedings may enable him to avoid removal altogether, see J.A. 181-182 (describing Korean authorities' unwillingness to issue a travel document because of the harsh impact of deportation on him and perceived chances of having his plea set aside)—does not demonstrate that he would have preferred a longer prison sentence if removal were unavoidable.

B. Petitioner's Speculation About Alternative Plea Offers Provides No Basis For *Strickland* Relief

Petitioner's argument in the court of appeals (and at the evidentiary hearing) was limited to the contention that, had he known the immigration consequences of his plea, he would have elected to go to trial. See Pet. C.A. Br. 35-39; see also J.A. 157. His argument in this Court, however, relies extensively on the supposition that, had he known that a conviction for drug distribution required removal, he might have obtained a plea deal that would have avoided that consequence. Even assuming this Court's precedents would allow for *Strickland* relief based on a plea offer that the prosecution never made, see pp. 32-36, *supra*, such relief is unwarranted here. Petitioner's "sheer speculation" about possible alternative plea deals, Pet. App. 8a, falls well short of establishing the requisite "reasonable probability" of a different outcome, *Strickland*, 466 U.S. at 694.

1. The government offered (and petitioner accepted) a plea bargain under which petitioner would plead guilty to an offense, defined as an aggravated felony, that he had admitted to committing, in exchange for "tangible" sentencing benefits. Pet. App. 46a. Nothing in the record suggests that the government was unaware of the removal consequences of that plea or that it might have been inclined to allow petitioner to escape them.

As the sentencing proceedings illustrate, although the government recognized that petitioner had no criminal history and was a successful restauranteur, it viewed petitioner as having committed "a serious offense." J.A. 122; see J.A. 122-123. The government emphasized to the district court that petitioner had

been engaged in "narcotics dealing since January of 2001"; that the confidential informant had purchased "200 ecstasy pills * * * between January of 2001 and December of 2008"; and that when agents searched petitioner's townhouse, "88 ecstasy pills were recovered at that time alone." J.A. 123; see *ibid.* (prosecutor stressing that petitioner's drug dealing had "been ongoing for quite some[ ]time"). The government accordingly sought a sentence of 24 months of imprisonment. See J.A. 119, 124.

Thus, the government not only charged petitioner with a felony drug offense for which any conviction (regardless of the sentence) would result in his removal, see p. 5, *supra*, but it favored a sentence commensurate with the seriousness of that offense. Accordingly, as the court of appeals recognized, "nothing in the record * * * indicat[es] that" the government "might have agreed to allow [petitioner] to plead guilty to a non-deportable offense if his attorney had pursued the matter." Pet. App. 7a-8a.

2. The government had no obligation to make any plea offer, let alone a specific one that petitioner might have preferred. See, *e.g.*, *Cooper*, 566 U.S. at 168; *Frye*, 566 U.S. at 148. As a matter of practice, federal prosecutors are advised to "weigh all relevant considerations" in deciding "whether it would be appropriate to enter into a plea agreement," including the "nature and seriousness of the offense or offenses charged" and the "likelihood of obtaining a conviction at trial." U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-27.420(A) (USAM), https://www.justice.gov/usam/united-states-attorneys-manual (last updated Jan. 2017). As petitioner points out (Br. 23), another consideration is the "probable sentence or other consequences if

the defendant is convicted." USAM § 9-27.420(A). But that consideration could cut either way and will not necessarily favor the defendant. And nothing in the *U.S. Attorneys' Manual* or any other federal guidance document requires federal prosecutors to make efforts to avoid the congressionally prescribed removal of aliens who have committed aggravated felonies. See 8 U.S.C. 1227(a)(2)(A)(iii).

Petitioner's extensive list (Br. 31-33) of hypothetical alternative plea deals illustrates the myriad flaws of his conjectural approach to *Strickland* prejudice. To begin with, each of the hypothetical plea deals on petitioner's list is more favorable to him on *every* dimension than the plea deal he was actually offered. Each would involve a plea to a less serious offense, a disposition under which he would serve less (or no) time in prison, or both. They would, therefore, not be creative alternative plea deals that would satisfy the interests of both parties, see *Padilla*, 559 U.S. at 373, but instead unilateral concessions by the government. Nothing suggests that the government, which sought a drug-distribution conviction and a two-year sentence, would have been satisfied with any of the more lenient dispositions that petitioner hypothesizes. Cf. *Cooper*, 566 U.S. at 167 (observing that the defendant there sought to restore "a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice").

Relatedly, all of the dispositions hypothesized by petitioner are ones that *any* defendant, not just an alien, would have preferred. That is a byproduct of the general (and sensible) correlation between the removability consequence of an offense and the severity of the sentence for that offense, both of which re-

flect a congressional judgment about the gravity of the crime. See 8 U.S.C. 1101(a)(43); see also H.R. Rep. No. 22, 104th Cong., 1st Sess. 8 (1995) (explaining that aliens who "clearly demonstrate a disregard for this nation's laws * * * have no legitimate claim to remain in the United States"). Congress's judgment that an alien who commits a serious offense should be subject *both* to a higher sentence *and* to removal is not a reason to favor such aliens in the *Strickland* prejudice analysis. It would invert congressional policy to presume that, precisely because Congress has prescribed removal in addition to prison for an alien drug dealer, an alien defendant is more likely than a similarly situated U.S. citizen defendant to receive (or more deserving than a U.S. citizen defendant of) an offer to plead his conduct down.

Furthermore, many of petitioner's speculative pleas are considerably far afield of the facts underlying the drug-distribution charge in this case. It is far from evident why the government would have been inclined to characterize petitioner's eight-year history of drug dealing as an accessory-after-the-fact, misprision-of-felony, or misdemeanor tax offense. See Pet. Br. 22, 32. And it is not even clear that a factual basis existed for petitioner to plead guilty to all those crimes, rather than the drug-dealing offense that he admitted to committing. See Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); *Cooper*, 566 U.S. at 164 (requiring proof that court would accept plea); *Frye*, 566 U.S. at 147 (same). Accordingly, petitioner's after-the-fact hypothetical better plea deal—like his after-the-fact preference for a trial that would realistically lead only to conviction, removal,

and a harsher sentence—fails to establish *Strickland* prejudice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. 8 U.S.C. 1101(a)(43)(B) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

3. 8 U.S.C. 1158 provides in pertinent part:

Asylum

* * * * *

(b) Conditions for granting asylum

* * * * *

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

* * * * *

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

* * * * *

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

4. 8 U.S.C. 1227(a)(2)(A)(iii) provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(A) General crimes

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

5. 8 U.S.C. 1229b(a)(3) provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(3) has not been convicted of any aggravated felony.

6. 18 U.S.C. 924(c)(2) provides:

Penalties

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

7. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * * * *

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Saman-

tha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury re-

sults, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * * *